Department of Justice

STATEMENT OF

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BEFORE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 3460 and H.R. 4431 - To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency.

February 8, 1984

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Mr. Chairman and Members of the Subcommittee:

We welcome the opportunity to appear before the Subcommittee to support legislation granting significant relief to the Central Intelligence Agency from burdens currently imposed by the Freedom of Information Act. The Subcommittee has before it two proposals to achieve this end - H.R. 3460 and H.R. 4431. For reasons I will outline later, the Department of Justice prefers the approach taken in H.R. 3460.

This Committee is already aware of the enormous burden FOIA imposes on the CIA. The compartmented nature of its files and the sensitivity of the information contained in them pose particular difficulties in searching and processing requested materials. Moreover, the subtlety of intelligence information necessitates review by skilled intelligence analysts rather than FOIA specialists, thus diverting the intelligence analysts from their primary mission. The Committee may not be as familiar with the burden litigation over CIA files imposes on the Department of Justice. To begin with, the Department can assign to CIA FOIA cases only those attorneys who have the necessary clearances to deal with the information at issue. Working with the CIA, these attorneys must formulate the sort of public affidavit called for in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) and Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), without at the same time

disclosing the very information they are requested to protect. Often, in order for the courts to appreciate the national security implication of requested records, extensive classified affidavits explaining their sensitivity must be filed. The courts, in turn, must struggle with the paradox of explaining the reasons for their decisions without disclosing the underlying facts. Yet this enormous expenditure in intelligence, legal and judicial time and energy invariably results in the classification being upheld and the requester denied the information.

If there were any public benefit served by FOIA requests of this type it would be appropriate for the Committee to weigh that benefit against security concerns. But there is no such benefit with regard to the operational files of the CIA. From the security standpoint a FOIA request diverts intelligence personnel from their mission, diminishes compartmentalization, ties up attorneys for CIA and Justice and clogs already crowded court dockets.

All that the public receives is the not inconsiderable bill.

Both H.R. 3460 and H.R. 4431 recognize that the time has come to eliminate this waste of resources. They focus on the most sensitive records of the CIA - those dealing with operations, intelligence sources and methods and the exchange of information with foreign liaison services. The bills provide FOIA relief only to files maintained in the Directorates of Operations and Science and Technology and the Office of Security. At the same time, they provide the possibility of FOIA access to files concerning special activities the existence of which are unclassified, matters which

have been investigated for possible violations of law and information concerning U.S. persons requested by those persons. Where the bills differ is in the means proposed to achieve the goal of FOIA relief. Under H.R. 3460 the Congress would describe the categories of files which should be exempt, and exempt them. The mechanism under H.R. 4431 is much more elaborate. The DCI would be required to issue regulations for the identification of exempt records within the statutory categories. Deputy Directors or Office Heads would then propose the designation of certain files within the category of records for which they have responsibility, and such designations would be reviewed at least every ten years. All designations and redesignations would require DCI approval. The courts would be authorized to review the regulations, the designations and even the placement of documents in the particular files.

Both bills would ease the initial FOIA search burden on the CIA. In our judgment, however, H.R. 4431 does nothing to ease the litigation burden on CIA, Justice and the courts but may even serve to increase it. Litigants would be invited to challenge the DCI's regulations and his subordinate's compliance with them and the filing practices of the CIA. This would create a new field of litigation in which there are no existing precedents to guide the attorneys or the courts. It takes little imagination to conclude that, at least from the Justice Department perspective, the cure offered by H.R. 4431 may well prove worse than the disease.

Accordingly, Mr. Chairman, we urge the Committee to adopt the straightforward approach of H.R. 3460 which provides the CIA with releif from the unwarranted burden of searching and analyzing files which, by their very nature, are protected from release.

We urge the Committee to question seriously whether the price of such relief should be additional burdens on the courts and the Department of Justice of the type inherent in H.R. 4431.

We have no other comments, Mr. Chairman, but will be happy to respond to any questions.

 FOIA

STATEMENT OF MARK H. LYNCH
ON BEHALF OF
THE AMERICAN CIVIL LIBERTIES UNION

ON H.R. 3460 and H.R. 4431

BEFORE THE
HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE

FEBRUARY 8, 1984

Mr. Chairman:

Thank you for your invitation to the American Civil Liberties Union to testify on H.R. 3460, introduced by Mr. Mazzoli, and H.R. 4431, introduced by Mr. Whitehurst. The latter bill is substantially similar to S. 1324, which passed the Senate on November 17, 1983. These bills amend the National Security Act of 1947 so as to remove certain files of the Central Intelligence Agency from the coverage of the Freedom of Information Act.

The ACLU is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights. The ACLU regards the FOIA as one of the most important pieces of legislation ever enacted by Congress because the Act positively implements the principle, protected by the First Amendment, that this nation is committed to informed, robust debate on matters of public importance. Accordingly, the ACLU is extremely wary of all proposals to limit the FOIA.

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However, the CIA's position on these bills and on S. 1324 marks a significant shift in the debate of the last several years over the applicability of the FOIA to the CIA which we welcome and commend. The Agency is no longer seeking a total exemption from the Act; it is no longer arguing that the Act is inherently incompatible with the operation of an intelligence

service; and it is no longer arguing that no information of any value has ever been released by the CIA under the Act. Most significant of all, the Deputy Director of Central Intelligence, Mr. John N. McMahon, stated before the Senate Intelligence Committee that if S. 1324 was enacted, "the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the Act."

If in fact no meaningful information now available under the FOIA will be withheld under this bill, and if the bill will result in more expeditious processing of requests, it will not be a set-back for the FOIA. However, there are many questions which must be answered before we can be confident that Mr. McMahon's assurance will be borne out. The Senate Intelligence Committee made a great deal of progress in answering these questions, and many of the answers are contained in that Committee's report on S. 1324. S. Rep. No. 98-305, 98th Cong., 1st Sess. (1983) (hereinafter "Senate Report"). Furthermore, the amendments adopted by the Senate Intelligence Committee improved the bill considerably.

Nevertheless, there is still important work for this Committee to do to assure the public that this legislation (1) will not result in the loss of any meaningful information now released under the Act, and (2) will improve the CIA's service to the public under the FOIA. We set forth below a number of steps which the Committee should take in this regard. Moreover, since some aspects of the CIA's filing systems and other internal operations are classified, the public must depend on this Committee to verify the assumptions on which these bills are based. Furthermore, as detailed below, there are a number of amendments

which we urge this Committee to adopt to refine and improve this legislation further.

What The Bill Would Do.

At this point, I would like to set forth our understanding of what this legislation would do, based on the CIA's testimony before the Senate Intelligence Committee and the Senate Report. If this understanding is mistaken or incomplete in any respect, we request clarification so there will be no misunderstanding over the legislation.

1. Certain operational files, the contents of which are now invariably exempt from disclosure, will be exempt from search and review. However, all gathered intelligence will be accessible, subject to the Act's exemptions, as it is now. This is possible because most items of gathered intelligence are routinely disseminated outside the components identified in the bill and are stored in non-operational files. In exceptional circumstances where gathered intelligence is stored in an operational component, it will be indexed in a non-operational file and will be subject to search and review. By making all gathered intelligence accessible, this bill is a significant improvement over past proposals which would have made only finished intelligence reports, such as national intelligence estimates, accessible. This is important, because finished intelligence may omit raw information that is important to understanding events.

2. Only the operational files of the CIA's Directorate of Operations, Directorate of Science and Technology, and Office of Security will be exempt from search and review. Thus, operational information located elsewhere in the Agency will be subject to search and review.

3. Information concerning investigations of illegality or impropriety in the conduct of intelligence activities will continue to be subject to search and review, even if the information is found only in operational files.

4. Operational files will be subject to search and review in response to requests for information concerning "special activities" -- i.e., covert operations for purposes other than the collection of intelligence -- if disclosure of the existence of such activities is not otherwise exempt under the FOIA. This provision codifies the current procedures under the Act. See e.g., Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

5. All CIA files, including operational files, will continue to be subject to search and review in response to requests from United States citizens and permanent resident aliens for information concerning themselves.

Steps To Assure That There Will Be No Loss Of Information Now Available.

In order to be sure that Mr. McMahon was correct when he said that the bill will not result in the loss of any meaningful information now released under the bill, we asked that the CIA analyze a number of documents of significance to the public which have been released by the Agency under the FOIA to determine whether these documents would be accessible under the proposed legislation. Our understanding from the published deliberations

of the Senate Intelligence Committee is that the CIA did this and that the results of the analysis were favorable. However, the analysis itself was never made part of the public record. Accordingly, we ask this Committee to make similar inquiries and to make the answers available to the public so that we can determine that this legislation will not diminish the quality of information currently available from the CIA under the FOIA. Furthermore, since the Senate deliberations, various people have brought to our attention other significant documents released by the CIA, and we request that these also be included in the CIA's analysis.

We also asked that the CIA prepare an analysis of how the bill would effect pending litigation so that there would be an ample public record against which to measure Mr. McMahon's assurances. This analysis too apparently was prepared but was not included in the published record. Accordingly, we request this Committee to take the step of requesting and publishing the analysis of the bill's effect on pending litigation.

Steps To Improve Processing.

I would like to focus for a moment on the CIA's promise that it will provide improved service to FOIA requesters under this bill. There is a very great need for improvement on this score. The two to three year wait which the public must now endure has greatly diminished the Act's utility. As Mr. McMahon acknowledged in testimony before the Senate Intelligence Committee, some people have given up making requests to the CIA because of the backlog. By removing from the FOIA's search and review requirement files which invariably are exempt from disclosure under the current provisions of the FOIA because of their sensitive

operational nature, this legislation will eliminate the requests which are primarily responsible for the backlog. But how will the continued processing of documents still subject to the Act be improved?

The Senate Intelligence Committee has addressed this question largely in budgetary and personnel terms, which of course are the foundation for improved service to the public. Accordingly, the Senate Committee has received assurances that the CIA will not reduce the resources now allocated to FOIA processing so that resources currently devoted to processing operational files will be diverted to processing requests for non-operational files which will continue to be subject to the FOIA.

While this commitment of resources is crucial and fundamental to improved processing, we believe that the processing problem has another dimension as well. There needs to be a change in the CIA's attitude toward responding to FOIA requests. For a number of reasons, some of which may be excusable and some of which may not, the CIA has developed a siege mentality toward the public and the FOIA. Consequently, the Agency has also developed a number of techniques to stymie the processing of requests and to put off requesters. Here are some recent examples:

1. On September 24, 1982, a member of the staff of the Center for National Security Studies requested CIA studies produced since October 15, 1979 on the subject of where the insurgents in El Salvador receive their weapons and other support. The request specifically disclaimed any interest in raw intelligence reports and limited itself to analytic studies. The CIA made the following response:

> Your request, as submitted, cannot be processed under the FOIA. Under the provisions of the FOIA, we are neither authorized nor required to perform research or create records on behalf of a requester. Almost without exception, our FOIA searches, because of the structure of our records systems, must be limited to those that can be conducted for records that are indexed or maintained under the name of an individual, organization, title, or other specific entity. Further, if our searches surface information, we are not permitted to analyze that information on behalf of a requester to determine if it is in some way related to an event, activity, incident, or other occurrence.

The foregoing paragraph is apparently a piece of boilerplate on a word-processor, for it appears in many Agency responses. By making this response, the Agency avoids its obligation to process the request. While there may be some requests that are so vague that such a response is appropriate, it is used in many cases where it is plainly inappropriate. In this instance, it was astonishing for the CIA to suggest that it cannot identify any studies on the source of weapons to the insurgents in El Salvador, for this is one of the key issues in the debate over U.S. policy toward that country. Indeed, this request asks for the same sort of information the President, the Secretary of State, the Secretary of Defense, or this Committee might request from the CIA. In fact, after further discussions between the requester and CIA personnel, the Information and Privacy Coordinator wrote on February 17, 1983 that he had arranged for a search of Agency files for responsive records. However, there should have been no need for this five month run-around -- a process which would deter less experienced requesters or those without ready access to legal counsel.

2. On February 3, 1983, CNSS requested information on the issue of whether former CIA employees William F. Buckley and E. Howard Hunt had complied with their obligation to submit their writings concerning intelligence matters for prepublication review. The request was prompted by Mr. Buckley's discussion of this topic in the January 31, 1983 issue of The New Yorker. The Agency replied with another piece of computerized boilerplate:

> So that we can be sure there are no privacy considerations, we need to have a signed and notarized statement from these individuals authorizing us to release personal information that otherwise would have to be withheld in the interest of protecting these person's privacy reights. These rights are addressed in the Privacy Act (5 U.S.C. 552a) and the FOIA (5 U.S.C. (b)(6)). If we should locate relevant records and did not have such an authorization, we probably would be unable to release substantially more than already appears in the public domain, such as that contained in newspapers and the like.

After a letter from counsel pointing out that compliance by public figures with their prepublication review obligations does not involve privacy concerns protected by the FOIA or the Privacy Act, the Agency agreed to process the request. It should have begun processing immediately upon receipt of the request without the intervention of lawyers and the threat of litigation.

3. In response to a subpoena from CBS News, the CIA produced a large number of CIA documents relevant to the libel litigation between CBS and General Westmoreland over the CBS News' report that the military falsified enemy troops strengths in Vietnam. All classified information was removed from these documents, and they were released to CBS without any restriction on the use to which they might be put. Indeed, both CBS and General Westmoreland have released some of these documents in

well-publicized press conferences. On August 25, 1983, one of my clients requested a set of these documents from the CIA. Since the CIA already had processed the documents for release to CBS, no further processing should have been required other than to copy them. Notwithstanding the seeming simplicity of this request, my client has not yet received a single page. This type of bureaucratic delay is inexcusable.

Mr. Chairman, I offer these examples of the CIA's techniques to resist compliance with the FOIA not to refight old battles but to demonstrate that Congress must take steps to insist that the CIA improve its compliance with the FOIA. The Agency says that this bill will alleviate its most pressing problems with the FOIA. In return for that relief the Agency must be required to make prompt, efficient, cooperative responses to the public. While this bill may eliminate the backlog, it will not by itself change the Agency's attitude toward the Act. Business as usual even with the relief provided by this bill will not be enough to insure compliance with the spirit of the FOIA. Accordingly, this Committee must go beyond the budgetary and personnel commitments which the Senate Committee received and require a firm commitment from the Agency's leadership to improve service under the Act and a detailed plan for accomplishing this objective. Furthermore, this Committee must make it clear that it intends to make CIA's compliance with the FOIA one of its oversight priorities.

Comments On Specific Provisions Of H.R. 3460 and H.R. 4431.

I now would like to turn to our comments on the specific provisions of H.R. 3460 and H.R. 4431. Some of these comments

concern drafting issues where we believe the bills can be made clearer and others concern important matters of substance.

Overall Organization.

In general we prefer the overall organization of H.R. 3460 to that of H.R. 4431 because the former is more straightforward and more simply stated. In particular, H.R. 3460 collects in one section, 701(b), all three circumstances in which operational files will remain subject to search and review. As a matter of drafting, we believe that this approach is preferable to H.R. 4431, which disperses those three circumstances between the second proviso to section 701(a) and section 701(c).

Also as a matter of drafting, we favor the way in which H.R. 3460 states in section 701(a) that operational files shall be exempt and then defines operational files in section 701(c). However, H.R. 4431 contains a very significant improvement over H.R. 3460 in that it links the different kinds of operational files with the specific components of the CIA where those files are found. We also favor the consolidation of the four types of operational files in H.R. 3460 to three in H.R. 4431. Also with respect to the definitions of operational files, we favor H.R. 4431's deletion of the word "counterterrorism," which as the Senate Report makes clear, is included in other terms employed by H.R. 4431. Accordingly, we recommend that the final bill be organized along the lines of H.R. 3460 but with the definitional section drawn from section 701(a) of H.R. 4431.

Requests By Individuals For Information About Themselves.

H.R. 4431 provides that all files shall be subject to search and review whenever United States citizens or lawfully admitted permanent resident aliens request information about themselves pursuant to the Privacy Act or the FOIA. H.R. 3460 omits any reference to the Privacy Act. We believe that both Acts should be included because there are circumstances where it is advisable for individuals to invoke both the FOIA and the Privacy Act when requesting information about themselves.

Requests By Organizations For Informatin About Themselves.

We also urge this Committee to explore the possibility of expanding the concept of first-party requests to include requests by political, religious, academic, and media organizations which have been operationally targeted or utilized by the CIA. Such an amendment would do a great deal to assure the public that information about CIA activities which effect the exercise of First Amendment rights will not be lost as a result of this bill.

The Senate Intelligence Committee rejected the concept of requiring search and review in response to first party requests by organizations for the following reasons:

> Such search could run the gamut of operational files because U.S. organizations are frequently referred to incidentally in Agency operational documents. Reference to a U.S. organization in an operational document does not necessarily indicate that the organizations was targeted by or involved in a CIA operation. Because of the volume of incidentally acquired information, granting domestic organizations the same access as individuals would resurface the problems this bill is designed to alleviate -- risks to sources and methods by breaking down compartmentation of operational files and commitment of operations officers to nonproductive FOIA review.

Senate Report at 28.

Mr. Chairman, we do not advocate an amendment which will require so much processing that it defeats the bill's objective to reduce the CIA's backlog. However, we believe that the objections expressed in the Senate Report suggest that there are ways to limit the circumstances in which first-party organizational requests trigger search and review so that the CIA's task is manageable. This can be done by limiting the type of organization to those whose activities inherently involve the exercise of First Amendment rights -- political, religious, academic, and media organizations. Furthermore, the search required by requests from such organizations could be limited to files concerning the CIA's operational targeting or use of such an organization. Thus, it would not be necessary to search for all incidental references to a requesting organization -- a problem which the Senate Report suggests is the main objection. We urge this Committee to explore whether such a middle-ground approach to requests by organizations is feasible. If it is, incorporation of such an approach will certainly make this bill more acceptable to the public.

Requests For Information Concerning Special Activities.

Both H.R. 3460 and H.R. 4431 provide that operational files will continue to be searched for information concerning "any special activity the existence of which is not exempt from disclosure under the Freedom of Information Act." As noted above, the purpose of this provision is to codify current law and to insure that information concerning covert actions will be

available to the same extent it now is. We have no problem with the language in these bills on this issue, but we are concerned that the Senate Report may be construed to give a "tilt" to current law.

The discussion at pages 24-25 of the Senate Report seems to suggest that covert actions will be exempt from disclosure unless an authorized Executive Branch official has officially and publicly acknowledged the existence of the covert action. Indeed, this is the position which the CIA takes in litigation. However, we believe that there are additional circumstances under which a covert action may no longer be exempt from disclosure. For example, a requester might argue that actions by a House of Congress or one of its Committees disclose enough information about a covert action so that a court should conclude that its existence is no longer exempt from disclosure; or a requester might argue that a covert action has become so widely known to the public that a court should conclude that its existence is no longer exempt from disclosure. The validity of these arguments is presently an open question in the courts.

We do not ask the Congress in this bill to take any position on the validity of these various arguments over when the existence of a covert action can no longer be exempt under the FOIA. Indeed, one of the reasons that this bill is not highly controversial is that it does not address the substantive scope of the FOIA's exemptions from disclosure. We do not believe that the Senate Report meant to take any position on the issue of when the existence

of covert operations is exempt from disclosure, but we are afraid that such an implication might be drawn from the Report. On the other hand, the separate views of Senators Durenberger, Huddleston, Inouye, and Leahy expressly disclaim any such implication (Senate Report at 42), as does a colloquy between Senators Goldwater and Huddleston on the Senate floor during the debate on the bill. 129 Cong. Rec. S 16745 (daily ed., Nov. 17, 1983). For the sake of absolute clarity, we urge this Committee to include in its Report a statement along the lines of the separate views of these four Senators.

Requests For Information Concerning Investigations Of Illegality Or Impropriety.

There is a major difference between H.R. 3460 and H.R. 4431 on the issue of search and review of operational files for information concerning matters which have been investigated for illegality or impropriety in the conduct of an intelligence activity. H.R. 4431 provides that operational files will continue to be searched "for information reviewed and relied upon" in the course of such an investigation. H.R. 3460 provides that operational files will continue to be searched "for information concerning . . . the subject" of such an investigation. We feel very strongly that the approach taken by H.R. 3460 must be adopted. In our view, the issue determining search and review in these circumstances should not be whether documents were reviewed or relied on, but whether they concern the subject which is important enough to have been the subject of the investigation. Even if investigators overlook relevant documents in the course of an investigation, those overlooked documents should be subject to search and review.

With respect to the proviso on investigations, we also suggest that the list of bodies whose investigations require search and review be modified slightly. Both H.R. 3460 and H.R. 4431 now list "the intelligence committees of the Congress, the Intelligence Oversight Board, the Office of General Counsel of the CIA, the Office of the Inspector General of the CIA, or the Office of the Director of Central Intelligence." To these we would add any special Presidential Commission or Select Committee of Congress established to investigate intelligence activities.

Disseminated Information Stored In Operational Files.

Both H.R. 3460 and H.R. 4431 provide that information derived or disseminated from operational files and found in non-operational files shall be subject to search and review. The CIA's testimony before the Senate Intelligence Committee and the Senate Report make clear that most items of gathered intelligence are routinely disseminated beyond operational files and therefore will be subject to search and review because they are stored in non-operational files. However, the CIA's testimony and the Senate Report also make clear that some items of gathered intelligence are disseminated outside the Operations Directorate on an "eyes only" basis and then are returned to the Operations Directorate for storage. The Senate Report clearly states that such documents will be subject to search and review because they have been disseminated outside operational components. However, this concept is not spelled out as clearly in any of the statutory language as it is in the Senate Report. Indeed, both H.R. 3460 and H.R. 4431 only provide that documents from operational files

contained in non-operational files will be subject to search and review. Accordingly, we urge this Committee to include statutory language to indicate clearly that documents which are disseminated outside operational components but stored in operational files are subject to search and review.

Judicial Review.

One of the most important issues in this legislation is the question of the scope and standard of judicial review. One of the most important and unique features of the FOIA, as it was passed in 1966, is that members of the public can obtain de novo judicial review of agency decisions to withhold information. Almost all judicial review of actions by government agencies is conducted under a deferential standard, such as whether the agency action is arbitrary or capricious, is an abuse of discretion, or has a rational basis. The FOIA provision for de novo review, however, requires courts to take a harder look at agency decisions to withhold information than courts take at other agency actions. This searching standard of review is codified in section 552(a)(4)(B) of the FOIA, and it is in many ways the engine which makes the Act work. Because agencies know that they face de novo review, they must be very careful when they decide to withhold information. Because of de novo review courts have the authority to examine closely agency decisions to withhold information. With this authority, courts can vindicate the rights which Congress conferred on the public when it enacted the FOIA. Because of the vital importance of de novo review, the ACLU must oppose any legislation which threatens to erode this standard of judicial review.

When S. 1324 was introduced, it, like H.R. 3460, made no mention of judicial review. Thus, we assumed that any disputes arising under this legislation would be judicially reviewable under section 552(a)(4)(B) of the FOIA. Such disputes might arise over the following issues: (1) whether files are in fact operational files as defined in the bill; (2) whether documents have been improperly placed solely in operational files; and (3) whether any of the provisos requiring search of operational files are applicable, that is, (a) whether the requester is a person entitled to make a first-person request for information, (b) whether the request concerns a special activity the existence of which is not exempt from disclosure under the FOIA, or (c) whether the requested information concerns an investigation for illegality or impropriety. Let me also stress that we do not anticipate that such disputes will arise very often under this legislation. Indeed, the difficulty which has been encountered in devising procedures to handle these disputes is far out of proportion to the frequency with which they will occur.

Since we assumed that disputes arising under this legislation would be judicially reviewable, we were startled when the CIA announced at the hearings before the Senate Intelligence Committee that in the Agency's view there would be no judicial review of CIA determinations under S. 1324. We responded that this view was wholly unacceptable and that we would oppose any bill that would restrict the level of judicial review now available under the FOIA.

The Senate Committee decided that judicial review was important and should be maintained. In response to that stand, the CIA refined its position and pointed out specific burdens which it has encountered in litigation over its decisions to withhold specific documents under the FOIA exemptions. These burdens arise primarily from the requirement that the Agency file detailed affidavits justifying its withholding decisions on a page-by-page, document-by-document, and paragraph-by-paragraph basis. Since we do not believe that disputes under this legislation will involve the same kind of issues that arise when the CIA withholds documents as exempt under the Act, we did not object to report language or statutory language which would make clear that courts should handle disputes under this legislation with different procedures than those used in disputes over whether documents fall within the Act's exemptions, provided that both types of dispute are subject to de novo review.

The language which now appears in section 701(e)(1) of H.R. 4431 represents an attempt to accommodate all of these interests. However, that language was hastily drafted on the eve of the Senate Committee's mark-up and could be considerably clearer. Accordingly, we think that this Committee can substantially improve the way judicial review is addressed and that in doing so it can meet both the concerns of the CIA that it not be subjected to unduly burdensome litigation demands under this legislation and the concerns of the public that de novo review be maintained. Such an accommodation should include the following principles, which we believe are consistent with the intent, if not the actual result, of section 701(e)(1) of H.R. 4431.

First, review should be available for all types of disputes which may arise under this legislation. See p. 17, supra. As H.R. 4431 is now drafted, it is not clear that judicial review is available when there is a dispute over the applicability of the provisos requiring search of operational files.

Second, review should focus not on whether the CIA's regulations comply with the statute but on whether in any specific case the CIA's action has complied with the statute. As section 701(e)(1) of H.R. 4431 is now drafted, it requires that in the first instance the court shall determine whether the Agency's regulations comply with the statute. However, if the requester makes a prima facie showing that the Agency has not complied with the statute, the court must make a further inquiry. We believe that the intent of the section is that on this second inquiry the court shall determine whether the Agency has complied with the statute. However, because of ambiguity in the drafting, the section is susceptible to the interpretation that even after the requester has made a showing of non-compliance with the statute, the court's determination is limited to whether the regulations, rather than the actual Agency action in question, comply with the statute. This interpretation would undermine the principle of de novo review, and therefore the statute and legislative history need to be clarified to insure the rejection of this interpretation.

Third, to avoid any ambiguity, the following procedures should be spelled out clearly. Whenever a complaint alleges that the CIA has not complied with the statute, the Agency should

be permitted to rebut the allegation with an affidavit from an appropriate Agency official averring that the Agency has complied with the statute. At that point, the burden of proof should shift to the plaintiff to show a genuine dispute that the Agency's affidavit is incorrect. We have no objection to requiring the plaintiff to do this by an affidavit based on personal knowledge or otherwise admissible evidence, for the Federal Rules of Civil Procedure require no less. If the court finds that the plaintiff has raised a genuine issue that the Agency has not complied with the legislation, it can require further submissions from the CIA, which can be filed in camera ex parte if they are classified. This procedure for in camera ex parte filings, when necessary, is consistent with current practice. Although we agree that the plaintiff would not be able to direct discovery to the CIA on his own initiative, it is important that the court have the authority to require the CIA to make whatever submission which the court determines is necessary to resolve the controversy before it. Any implication in the Senate Report that this authority is circumscribed should be rejected. However, we stress that (1) ordinarily a CIA affidavit demonstrating compliance with the statute will be sufficient, and (2) these affidavits would not be the same as the detailed affidavits which the Agency is required to file in support of its decisions to withhold documents under the exemptions to the FOIA.

Fourth, the standard of review which the court applies to the question of whether the Agency has complied with the statute must be de novo, as is the standard of review for all other

determinations under the FOIA. Unfortunately, the Senate Report (p. 31) states that the court should apply a "rational basis" only to regulations standard of review. That deferential standard of review is unacceptable.

Finally, Mr. Chairman, there is the question of how these principles should be expressed in the legislation. Our view is that it would be best for the statute to state simply that disputes arising under section 701 are reviewable under section 552(a)(4)(B) of the FOIA and for the procedures outlined above to be set forth in the legislative history. The reason for this preference is that it is easier to write out the procedures in ordinary language than in statutory language. Furthermore, reference to section 552(a)(4)(B) would emphasize that review is to be de novo. However, if others believe it imperative for the procedures to be spelled out in the statute, that task can be accomplished, although it will require great care.

Requests For Files Of Historical Significance. — passed; does not

Testimony before the Senate Intelligence Committee demonstrated that S. 1324, as originally introduced, was deficient with respect to the needs and interests of historians. That testimony showed that operational information can be important to the writing of history and that after the passage of time it is often possible to declassify much operational information. However, as introduced, S. 1324 would have sealed operational files in perpetuity.

The CIA and the Senate Committee responded to this problems in the positive and commendable fashion. As an example of how operational files can be considered for declassification after

the passage of time, the Agency informed the Committee that the files of the OSS now held by the Operations Directorate would not be exempt from search and review. Furthermore, the CIA agreed to the provision which now appears as section 701(d)(2) of H.R. 4431. This amendment provides that not less than every ten years the CIA will review operational files or portions thereof to determine whether they can be made subject to search and review. The criteria for this determination "shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information conteind therein."

We believe that this provision is a very significant improvement in the legislation and we recommend that it be included in H.R. 3460. However, we also believe that one further step should be taken to protect the public's interest in historical research. As now incorporated in H.R. 4431, the decennial review is limited to the files which the CIA believes are of historical or other public interest and which the CIA believes can be declassified in significant part. Moreover, these determinations are not subject to any meaningful judicial review. For the purposes of decennial review, we do not object to leaving the Agency with the discretion to decide which files will be reviewed. However, with respect to older files, we think that members of the public should be able to petition for review of specific operational files which the CIA may not have removed from the exempt category through its discretionary decennial reviews. We do not at this time have a firm view on the precise age at which files should

become eligible for such citizen petition. Whether it should be 25, 30, or 40 years is a question which the Committee should explore with historians and with the CIA.

In order to make this citizen petition for removal of old files from the operational category effective, there should be a right of judicial review when the Agency denies a petition. The standard for such judicial review could be whether a senior official has determined that there is no likelihood that a significant portion of the specified file or specified portion of a file can be released to the public. Thus, the nature of this judicial review could be different from the nature of review of disputes over the release of specific documents, and it would not require page-by-page analysis of the documents in the file which the requester seeks to have removed from exempt status. Such a provision would, we believe, strike a balance between the interests of the public, and particularly historians, in being able to trigger review of specific files for removal from exempt status after the passage of an appropriate amount of time and the CIA's interest in avoiding the burden of page-by-page review in response to such petitions.

In summary, Mr. Chairman, the introduction and consideration of these bills represent an important step forward in balancing the interests of the CIA and the interests of the public in appropriately applying the principles of the FOIA to the Agency. Our position continues to be that if this legislation will not result in the loss of information now available under the FOIA, and if it will result in the improved processing of requests,

the ACLU will support it. The Senate deliberations resulted in several significant improvements in the legislation to meet this standard, but there is still important work for this Committee to do in establishing a convincing public record which shows that the bill will meet this standard and in drafting language that will precisely achieve its aims. We look forward to working with the Committee to complete this work.

Thank you, Mr. Chairman. I would be happy to answer any questions the Committee might have.